(14)

No. 91-194

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

QUILL CORPORATION,
Petitioner,
v.

STATE OF NORTH DAKOTA,
BY AND THROUGH ITS TAX COMMISSIONER,
HEIDI HEITKAMP,
Respondent.

**On Writ of Certiorari to the
Supreme Court of the State of North Dakota**

AMICI CURIAE BRIEF OF CARROT TOP INDUSTRIES, INC.; SARGENT SOWELL, INC.; FLORIDA GIFT FRUIT SHIPPERS ASSOCIATION; MAIL ADVERTISING SERVICE ASSOCIATION INTERNATIONAL; PARCEL SHIPPERS ASSOCIATION; AND MAILORDER ASSOCIATION OF NURSERIES IN SUPPORT OF THE PETITIONER

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STATEMENT OF INTEREST

The *amici curiae* who join in this Brief are either small mail order dealers or are trade associations of businesses engaged in some facet of the mail order industry. Virtually all of their members are small businesses. All have a vital interest in upholding *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753 (1967), and with the consent of the parties respectfully submit their brief as *amici curiae* in support of the position of the Petitioner, Quill Corporation.

* Counsel for Petitioner and Respondent have consented to the filing of this *Amici Curiae* Brief. *Amici* have filed those consents with the Clerk of the Court pursuant to Sup. Ct. R. 37.2.

1. *Carrot Top Industries, Inc.* is a privately held North Carolina corporation doing business in Hillsborough, North Carolina. It sells flags, banners, and flag poles nationwide. Since most dealers in the flag industry are small retailers in urban areas, Carrot Top serves smaller, rural areas and offers a service not otherwise available. Its annual gross sales are less than $2 million and it has five regular employees, plus several seasonal employees. It files monthly sales tax returns with the State of North Carolina, the only state in which it has a physical presence. Its billing system is "home grown," and were it required to collect use tax from all or even a small part of the 6000 potential taxing jurisdictions it would be overwhelmed. In the words of its president, "I simply could not survive. I would dismantle the company and lay off all my employees."

2. *Sargent Sowell, Inc.* is a privately owned Texas corporation doing business in Grand Prairie, Texas. Since 1948, it has been in the business of direct mail sales of industrial supplies to municipalities and industries. In the words of its president it sells "everything from communion cups to prison toilets." It also manufactures and sells traffic and OSHA safety signs. It has approximately 125 employees. It files monthly sales tax returns with the State of Texas.

More than 90% of its business is to customers who are tax exempt for one reason or another. Vendors are required to obtain and keep on file tax exempt certificates for purchasers to show to state tax auditors. The simple rule of most auditors for state departments of revenue is "no certificate, no exemption, no exception." It could not as a practical matter collect and keep track of use taxes in all of the taxing jurisdictions in which it sells products by mail. There is no computer system available to secure and keep current the thousands of tax exemption certificates it would need to secure and keep on file in its records. The additional people on its payroll needed to secure and monitor these certificates would be an unnecessary, unproductive burden on the company that would undermine its profitability and jeopardize its survival.

3. *Florida Gift Fruit Shippers Association* is a Florida corporation organized in 1946 with headquarters in Orlando, Florida. It is an association of citrus fruit shippers, all located in Florida. All are small, independent family businesses engaged in marketing agricultural products which they grow. Most have a $1 million or less annual gross volume of sales and virtually all but a few are in the range of $5 million or less in annual sales volume. Of its 138 members, approximately 5 have main frame computer capabilities, approximately 40 have some type of desktop computer system, and the balance of the other 93 members have no computer capability.

If *National Bellas Hess* were overruled, two thirds of the members of the association would have to restrict their sales to Florida. The remaining one-third would face very substantial costs and difficulty in dealing with the problems of registering, collecting, filing and remitting tax to more than 6,000 taxing jurisdictions. Their customers, who literally come from all parts of the country, order gifts to be delivered to all parts of the country. Many times the state of residence of the purchaser differs from the state of residence of the person to whom it is mailed. Collection for the correct state would create a great deal of confusion.

Moreover, some taxing jurisdictions exempt seller produced agricultural products if purchased for use by the purchaser. Keeping these exemptions straight would be formidable and practically impossible. Ironically, were a reversal of *National Bellas Hess* to come about and result in drying up the interstate domestic market, the major portion of their mail order business would then have to shift to Canada, Western Europe and Japan—markets that are being expanded everyday, and which envy, study and hope to emulate the present U.S. market with its relatively free flow of goods and commerce among all 50 states.

4. *Mail Advertising Service Association International* is a not-for-profit trade association organized under the laws of the District of Columbia with headquarters in Alexandria, Virginia. Its constituent members are businesses who prepare advertising materials for nationwide distribution. Collectively they provide mailing services in all states, Canada, the United Kingdom, Western Europe and Australia. The businesses represented are diverse. Some are engaged purely in the mechanics of providing mailing services to customers who have products to sell by mail order. Others are in the creative aspect of targeting mail advertising by demographics. There are businesses of all size represented in the Association. All would suffer significant adverse affects on their business activities were *National Bellas Hess* overruled.

5. *Parcel Shippers Association* is a District of Columbia trade association located in Washington, D.C. It is composed of approximately 200 members, primarily small businesses, who use the U.S. Postal Service and private parcel delivery services to deliver small parcels to their customers. The members are also heavily reliant upon the U.S. Postal Service as their principal means of soliciting sales from customers. Their customers in turn use the postal service to place orders for merchandise and pay their bills. Most of the association's constituent members would find it impracticable if not impossible to comply with multi-jurisdictional sales and use tax registration, collection, and filing/remission requirements. Were the holding of *National Bellas Hess* to be overruled, most would have to go out of business in the face of this insurmountable obstacle.

6. *Mailorder Association of Nurseries* is the only nonprofit organization representing and fostering the educational and professional needs of companies in the mail-order gardening and landscape industry. The Association was organized in the state of Michigan and presently maintains its headquarters in Laurel, Maryland. There

are over 180 member companies in the Association. The majority of member companies are actively engaged in the direct marketing of nursery stock, seeds, plants, bulbs and related products to home gardeners.

SUMMARY OF ARGUMENT

At no time since its opinion in *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 753 (1967), nearly twenty-five years ago, has this Court wavered in the slightest from its majority opinion. Every time this Court has examined a nexus issue that touched upon the authority of *National Bellas Hess* it has done so in a way which can only reasonably be read to have reaffirmed the continued vitality of its holding.[1]

The decision of the North Dakota Supreme Court is an aberration. It is a clear departure from the Court's holding in *National Bellas Hess*, a holding which is neither wrong nor obsolete. Reversal of the North Dakota court's decision is both appropriate and necessary to put to rest the uncertainty and confusion this decision has created in the marketplace. Refusal by certain states to accept the fact that the Constitution of the United States precludes them from requiring out-of-state mail order vendors with no physical presence within their borders to collect sales and use taxes has had a chilling effect on the willingness of new ventures to commit their resources to the mail order business. Threats such as this to the free flow of goods and commerce across state lines gave impetus to the Commerce Clause. The pall such a threat casts illustrates its continuing importance in the economic life of this nation.

If the North Dakota Supreme Court's opinion is upheld, then the very survival of the small companies rep-

[1] *National Geographic Soc'y v. California Bd. of Equalization*, 430 U.S. 551, 559 (1977); *D.H. Holmes v. McNamara*, 486 U.S. 24, 33-34 (1988); and *Goldberg v. Sweet*, 488 U.S. 252, 109 S. Ct. 582, 589 (1989).

resented in this *amicus curiae* brief will be jeopardized. Each of the over 6,000 state and local taxing jurisdictions will have the unrestricted power to require a mail order retailer, regardless of its size, sales or resources, to collect use taxes from its customers, to register and to file regular reports to each of the jurisdictions, and to make its records and personnel available for audit in the jurisdiction. Affirmance of the North Dakota Supreme Court's opinion would mean that any state or local government could "deputize" a company to collect use taxes on behalf of the state or local government, and to file returns with the government on a monthly basis so long as that company sends three catalogs to its residents. This "threshold" would quickly be exceeded by virtually every small mail order company.

Small mail order companies have neither the resources nor the technology to administer the divergent requirements of the states and localities. The only alternative for these companies would be to discontinue their businesses, thereby protecting local firms from interstate competitors.

The *National Bellas Hess* decision has made it possible for individuals without substantial resources to sell products to a national market unencumbered by the overwhelming burden of administering tax collection for thousands of governments. Entrepreneurs have been able to expand their businesses, and add an element of competition to local, sometimes insular, markets without having to devote nonproductive resources to use tax collection. If such entrepreneurs, as a condition of start-up, had been required to collect and remit the use tax on sales throughout the United States, they likely would not have begun their businesses in the first place.

The economy needs all the jobs and business activity that entrepreneurial capital can produce. It would be strange indeed were this Court to reverse 24 years of precedent and virtually wipe out a significant segment of an entire industry. At the very least, such far ranging

policy decisions should be made by Congress, which can weigh in a political context the perils to the industry against the states' needs.[2]

A state's requirement that out-of-state dealers register and collect use taxes as a condition of conducting an interstate business via U.S. mail is a state regulatory activity which violates settled Commerce Clause jurisprudence. No state can require registration to do business when a non-resident, non-localized foreign corporation engages exclusively in interstate business.[3] Likewise, it cannot be required to register as a dealer and collect use taxes.

ARGUMENT

I. A DECISION OF THIS COURT OVERRULING *NATIONAL BELLAS HESS* WOULD PLACE IN JEOPARDY THE SURVIVAL OF SMALL MAIL ORDER COMPANIES CONDUCTING INTERSTATE SALES TRANSACTIONS.

The North Dakota law that the North Dakota Supreme Court ruled constitutional provides that any company that sends three or more mailings to North Dakota residents

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[2] It would be a most unfortunate coincidence were this Court's reversal of *National Bellas Hess* to occur in the same year the European Community is expected to complete its 15 nation, border-free trade agreement. By what logic would United States scholars and diplomats explain why we relinquished by judicial fiat the very engine of free trade and commerce among our 250 million persons market that our European allies (and competitors) have struggled for decades to create in the face of nationalistic obstacles that by comparison make this quarrel among states for tax revenues mere insignificant caviling. Where would a reversal of *National Bellas Hess* leave the administration in its efforts to create a North American Free Trade zone? Would U.S. mail order dealers have to prepare to collect and remit Canadian and Mexican use taxes for each of their states, provinces and municipal districts in three languages?

[3] *Allenberg Cotton Co. v. Pittman*, 419 U.S. 20 (1974).

is required to administer the North Dakota sales and use tax law. N.D. Cent. Code § 57-40.2-01(6) (Supp. 1989); N.D. Admin. Code § 81-04.1-01-03.1(3). If the North Dakota Supreme Court's decision is not reversed, then every state, county, municipality, school district, transit district, and water and sewerage district throughout this country could impose use tax collection duties on mail order companies simply because they mailed catalogs into the district. As a condition of starting a business, or continuing their businesses, individuals would have to establish an elaborate mechanism and extensive work force enabling them to comply with the complex tax laws of the various jurisdictions.

A. Serving a National Customer Base Would Require the Ability to Collect Taxes in Any of Over 6,000 Different State and Local Taxing Jurisdictions, With Varying Product and Transaction Exemptions, Filing Procedures and Deadlines.

Small mail order companies could be required to deal with the individual requirements of over 6,000 different state and local taxing jurisdictions. As if different rates for each locality were not bad enough, each jurisdiction potentially has its own set of rules for exempt products, exempt purchasers and exempt transactions, to say nothing of each with its own forms, its own filing frequency and submission deadlines; and these change constantly. Even if a mail order company were able to figure all of this out, how is it going to set it out in understandable form on the back page of its catalog so that each customer can figure how much tax to include in his or her check with the order? What is the dealer to do when the amount of the remitted check is based on a miscalculation of the tax due—refund an excess, reject the order, bill for an underpayment, or just let it go?

B. The Administrative Problems of Compliance Would Be Substantial, Would Not Easily Be Solved by Computerization, and Would Be Disproportionately Expensive and Burdensome on Small Companies, With the Result that Most Small Companies Would Have to Go Out of Business.

A small mail order company would be required to shoulder an overwhelming burden if *National Bellas Hess* were overruled. A mail order company could be required to file, each month, 428 returns, for a total each year of 5,136 use tax returns.[4] This amounts to compiling, preparing and filing approximately 21 use tax returns each and every work day. This would be a formidable task even if the company had the benefit of adequate computerization, including suitable hardware and software, and personnel to operate it. A company that takes seriously its obligation to provide a statement under penalty of perjury that the disclosures on the return are accurate[5] would require several persons to corroborate the information generated by the computer and varify the accuracy of the returns. It has been reported, for example, that AT&T employs 76 persons to handle sales and use taxes, and files some 9000 returns annually.[6] While AT&T is a large company, a small mail order company would still need to hire a number of employees simply to prepare and file 5,136 returns each year.

Moreover, most small companies do not have the capital and sufficient sales volumes to purchase computers and software to prepare tax returns. In fact, one study found that a company's sales should exceed $5 million in order

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[4] *See* Appendix 3 to *Amicus Curiae* Brief of Direct Marketing Association (hereinafter referred to as DMA *Amicus* Brief).

[5] Every state imposes criminal penalties for filing false returns.

[6] "Sales Tax Nightmare on Main Street," *Forbes* at 37 (9/30/91).

to use efficiently the available use tax software.[7] Preparing 21 returns on a daily basis manually would require a large number of employees. For companies such as Carrot Top Industries, Inc. and Sargent Sowell, Inc. as well as for most of the members of the associations represented in this Brief, this would simply not be economically feasible.

Second, product exemptions and transaction exemptions vary substantially from state to state. For example, oranges sold by the producer (but not by a non-producer) are treated as exempt from sales tax by North Carolina,[8] may be exempt in Tennessee, and are taxable in Arkansas. Many states, but not all states, exempt flags, although banners, bunting and flag poles are taxable. Sales to religious and charitable organizations are exempt in some jurisdictions and not exempt in others; and while sales to municipalities are usually exempt, they are not exempt if the product is used by a contractor for a municipality.[9]

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[7] *See* Advisory Commission on Intergovernmental Relations, *State and Local Taxation of Out-of-State Mail Order Sales*, 6-7, 15 (April 1986) (hereinafter referred to as 1986 ACIR Report).

[8] An exemption granted by administrative grace. For a typical exemption provision for "agricultural products" *see* Tenn. Code Ann. § 67-6-301 (1989) which exempts from the sales tax the gross proceeds from the sale of livestock, nursery stock, poultry and other farm and nursery products directly from a farmer or nurseryman if 50% or more of such products are grown or produced by the farmer or nurseryman.

[9] These "activity" exemptions are peculiarly localized and politicized, and vary from the VFW to ethnic civic leagues, all with no rhyme or reason other than who had what political clout at one time. *See Jimmy Swaggart Ministries v. California Bd. of Equalization*, —— U.S. ——, 110 S. Ct. 688 (1990) upholding California's tax on sales by religious organizations. In contrast, *see* Tenn. Code Ann. § 67-6-322 (1989) exempting sales to 18 "religious, educational and charitable institutions" including those promoting "statewide talent and beauty pageants." *See also* Tenn. Code Ann. § 67-6-209(b) (Supp. 1990), the "Contractors Use Tax" provision.

Computers cannot be used to determine what are exempt products and exempt transactions.[10]

Third, small mail order companies would be subject to audit by each of the 432 jurisdictions that administer sales and use taxes throughout the country. Mail order marketers could find themselves embroiled in a never-ending series of audits tying up valuable time and resources of people critical to the successful day-to-day operation of their business.

Fourth, the problems in collection of use tax from consumers who do not remit the tax with their orders are significant. Since the amount of use tax due on an order is typically substantially under $10.00, the costs of post-sale collection can exceed the amount to be recovered from the customer. In most cases, the company may have no practical choice but simply to pay the tax out of what little profits remain on the transaction and forego collection from the customer.

In short, the Court's description in *National Bellas Hess* of the administrative burden continues today for small mail order companies. As the Court stated:

> And if the power of Illinois to impose use tax burdens upon National were upheld, the resulting impediments upon the free conduct of its interstate business would be neither imaginary nor remote. . . . The many variations in rates of tax, in allowable exemptions, and in administrative and record-keeping requirements could entangle National's interstate business in a virtual welter of complicated obligations to local jurisdictions with no legitimate claim to impose "a fair share of the cost of the local government."

386 U.S. at 759-60 (footnotes omitted).

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[10] *See* Appendix 4, DMA *Amicus* Brief. Nor can computers obtain, screen for completeness, and keep on file thousands of exemption certificates.

Today there are over 6,000 jurisdictions that impose sales and use taxes;[11] whereas there were only 2,300 when the Court decided *National Bellas Hess*. 386 U.S. at 759 n. 12. Furthermore, there are now 90 separate rates of tax[12] as compared with 8 when *National Bellas Hess* was decided. *Id.* at 759 n. 13. In 1967 National Bellas Hess was a very large company which had annual sales of $60 million. Certainly, if anything, it would be more difficult today for a small mail order company to collect sales and use taxes throughout the country than would have been the case for National Bellas Hess in 1967.

It is doubtful that computer programs that will automatically track the myriad of sales and use tax rates rules, and exemptions nationwide are feasible. If they did exist, the cost would be prohibitive to smaller dealers. Compliance would require a large fixed cost for people and equipment which results in a very high relative cost of collection being imposed on small mail order dealers.[13] Most simply will not be able to afford the expense and handle the administrative burden of use tax collection nationwide.

In short, many small companies faced with these compliance problems will have no real choice but to stop their mail order business. They simply cannot survive. The consequence will be a lessening of competition for local merchants. This suggests that the result of the increased costs of doing business is both discriminatory against interstate merchants[14] and protectionist of local merchants.[15] Safeguarding against discrimination is the very core value protected by and enforced under the Commerce Clause. *See Boston Stock Exchange v. State Tax Comm'n*, 429 U.S. 318 (1977).

[11] *See* Appendix 1 to DMA *Amicus* Brief.

[12] *See* Appendix 2 to DMA *Amicus* Brief.

[13] *See* 1986 ACIR Report at 48.

[14] The cost of compliance with the North Dakota use-tax collection requirement is six to seven times greater for mail order marketers than it is for retailers that collect sales tax at the cash register. *Brief of Petitioner*. North Dakota's rate of reimbursement for these compliance costs is the same for in-state and out-of-state sellers alike. *See* N.D. Cent. Code § 57-40.2-07.1(1). That cost approximates the actual costs to the average local retailer. Thus, interstate marketers are disadvantaged. It is true that they are similarly disadvantaged if they have physical presence in the taxing jurisdiction, but interstate firms have control over their decision to localize. The North Dakota rule gives small marketers only two choices: serve the state and collect use taxes or exit the market. The Commerce Clause assures access to each state market, and the choice put to small marketers is one that the Commerce Clause bars.

[15] North Dakota's tax-collection scheme, while facially neutral, discriminates in practice. Such discrimination is unconstitutional under the Commerce Clause. *See, e.g., Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333 (1977). *Cf. Nippert v. City of Richmond*, 327 U.S. 416 (1946) (cumulative costs of interstate merchants, which increase costs of interstate sellers relative to intrastate merchants, are discriminatory in violation of the Commerce Clause); *American Trucking Ass'n v. Scheiner*, 483 U.S. 266 (1987) (flat taxes on trucks discriminate against interstate trucks that use state's highway proportionately less than intrastate trucks).

II. SMALL MAIL ORDER COMPANIES DO NOT RECEIVE ANY BENEFITS FROM STATES TO WHICH THEY SEND THEIR CATALOGS AND SHIP THEIR PRODUCTS.

The North Dakota Supreme Court concluded that "the direct marketing of the 1990's bears little resemblance to the mail order of the 1960's." *North Dakota v. Quill Corp.*, 470 N.W.2d 203, 209 (N.D. 1991). The Court felt that mail order customers' use of "toll-free incoming telephone lines, national WATS telephone service, fax machines, telex, or direct computer communication" somehow provides benefits to out-of-state companies. *Id.*

The small mail order companies disagree with this conclusion. The fact remains that each of these cited means of communication involved interstate common carriers, which the Court in *National Bellas Hess* clearly found to not constitute a benefit received by an out-of-state company. 386 U.S. at 758.

More importantly, however, most small mail order companies do not use any of the so-called modern communication devices referred to in the *Quill* case. Carrot Top Industries and most of the Florida fruit shippers receive orders solely by mail and by telephone, without the use of toll-free incoming telephone lines or national WATS telephone service.

III. IF ANY CHANGE IS NECESSARY TO THE *NATIONAL BELLAS HESS* STANDARD, IT SHOULD BE MADE BY CONGRESS, AND NOT BY THE COURTS.

As this Court observed in the majority opinion in *National Bellas Hess*, any change in the rule of nexus for mail order dealers is appropriately addressed to the Congress of the United States. Many hearings have been conducted and many proposals have been set forth in Congress attempting to balance the interest of states in collecting their tax revenues and the interest of private concerns in being able to engage in interstate commerce without undue restriction and regulation. Each of the bills would have provided for a *de minimis* exemption such that small companies such as the instant *amici* would have been exempt from sales tax.[16] *De minimis*

[16] All recent Congressional bills introduced to overrule *National Bellas Hess* incorporated a *de minimis* exception. For example, H.R. 5021, 99th Cong. 2d Sess., 132 Cong. Rec. H3656 (1986), H.R. 1891, 100th Cong. 1st Sess., 133 Cong. Rec. H1764 (1987), H.R. 3521, 100th Cong. 1st Sess., 133 Cong. Rec. H8916 (1987), and S. 1099 100th Cong. 1st Sess., 133 Cong. Rec. S5603 (1987) provided an exemption for those companies that had gross receipts in the United States of not more than $12.5 million or in each state of not more than $500,000 in any calendar year. H.R. 1242, 100th Cong., 1st Sess., 133 Cong. Rec. H835 (1987) provided a $5 million threshold for annual sales.

exemptions were proposed because of the clear recognition that small mail order companies would not be able to stay in business and collect use taxes in 45 states (and the District of Columbia).[17] These bills have not been adopted, blocked for the most part by the inability of states and their local governments to agree on such issues as uniform rates. Resort by the States to the passage and attempted enforcement of nexus statutes which are in clear conflict with well settled constitutional principles and after Congress has refused to adopt legislation overruling *National Bellas Hess* is a tactic that should be soundly rebuffed by this Court.

Confrontation with a settled constitutional doctrine rather than reaching a reasonable political accommodation in the Congress should not be rewarded,[18] and most

[17] The Congressional agency ACIR recommended in its 1986 report a *de minimis* exemption from sales and use tax collection for companies with national sales of less than $12.5 million, stating as follows:

> To reduce the compliance cost burden on small businesses, the legislation would contain a de minimis rule, exempting vendors with national sales and/or sales in the destination state below a specified dollar amount. The de minimis figures should be no less than $12.5 million in gross sales, indexed annually to the Consumer Price Index to account for inflation.

1986 ACIR Study at 5. It is noteworthy that, even though ACIR also proposed 46 national rates administered by the states rather than the 6,000 rates to ease compliance costs, it strongly recommended exemption for small mail order companies because of the compliance costs in collecting taxes in only 46 jurisdictions. 1986 ACIR Study at 15. If the North Dakota Supreme Court's decision is upheld, mail order companies will not only have to collect sales and use taxes, but could have to collect them for over 6,000 jurisdictions.

[18] The ability of states to influence Congress has been recognized by this Court. *See Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

certainly the interests of small entrepreneurs and businesses should not be sacrificed in the process.

IV. NORTH DAKOTA'S REQUIREMENT THAT OUT-OF-STATE MAIL ORDER DEALERS REGISTER, COLLECT AND REMIT TO IT USE TAXES AS A CONDITION OF CONDUCTING BUSINESS IN NORTH DAKOTA THROUGH THE U.S. MAIL AND VIA COMMON CARRIER IS A STATE REGULATORY ACTIVITY WHICH VIOLATES SETTLED COMMERCE CLAUSE JURISPRUDENCE.

In its opinion the North Dakota Supreme Court understandably focused its attention on *National Bellas Hess, Inc. v. Department of Revenue*, 386 U.S. 754 (1967), and its ongoing vitality.[19] The North Dakota Supreme Court placed great emphasis on the changing legal landscape in the area of state taxation wrought by this Court's decision in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977), and concluded that "the foundational basis of *Bellas Hess* has been eroded." 470 N.W.2d at 209. *Amici* believe that the North Dakota Supreme Court erred in this conclusion. The doctrinal foundation of *National Bellas Hess* was entirely left intact by *Complete Auto*, which recognized that no state could tax interstate commerce unless the activities of interstate commerce that a state sought to tax had a substantial nexus with the taxing jurisdiction. In addition, by exclusively relying on the framework developed for state taxation cases in *Complete Auto*, the North Dakota Supreme Court failed to recognize the reinforcing effect of this Court's settled jurisprudence when state regulatory activity is reviewed under the Commerce Clause, and the fact that Quill's grievance is with the regulatory reach of North Dakota's law. Quill does not contest North Dakota's power to assess a use tax on its sales to North Dakota residents, but instead contends that it should not be required to register and collect use taxes for North Dakota.

[19] In refusing to comply with the holding of *National Bellas Hess*, the North Dakota Supreme Court violated the admonition of this Court that the overruling of directly applicable Supreme Court precedents is a prerogative of this Court. Lower courts are duty-bound to apply a directly applicable precedent unless that precedent has been explicitly or implicitly overruled: "If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the [lower courts] should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989).

A. Regulatory Cases Under the Commerce Clause: An Analytical Overview.

This Court has "adopted . . . a two-tiered approach to analyzing state economic regulation under the Commerce Clause." *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 467 U.S. 573, 578-79 (1986). When a regulatory measure "has only indirect effects on interstate commerce and regulates evenhandedly," the Court has applied a balancing analysis. The question is "whether the State's interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits." *Id.* at 579, citing *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).[20] On the other hand,

[20] This balancing approach, which traces back at least as far as this Court's decision in *Southern Pac. Co. v. Arizona*, 325 U.S. 761, (1945), has been controversial and subject to criticism from the outset. *See id.* at 789 (Black, J., dissenting). Critics argue that such a balancing process is "ill-suited to the judicial function." *See CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 95 (1987) (Scalia, J., concurring in part and concurring in judgment). They assert that the balancing approach requires weighing interests that are "incommensurate," a process that is "squarely within the responsibility of Congress." *Bendix Autolite Corp. v. Midwesco Enters., Inc.*, 486 U.S. 888, 897 (1988) (Scalia, J., concurring in judgment). Dispite criticism of this aspect of Commerce Clause doctrine, Justice Scalia has stated that "[i]ssues already decided [*e.g., National Bellas Hess*] I would leave untouched." *Id.*

"[w]hen a state statute directly regulates . . . interstate commerce," this Court has "generally struck down the statute without further inquiry." *Brown-Forman Distillers Corp.*, 476 U.S. at 579.[21] That is, when a state "directly regulates" interstate commerce, the state regulatory law constitutes a violation of the Commerce Clause without the necessity of engaging in a balancing analysis.[22] *See Healy v. Beer Inst., Inc.*, 491 U.S. 324, 336-37 & n. 14 (1989); *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 88-89, 94-95 (1987) (Scalia, J., concurring in part and concurring in the judgment); *Edgar v. MITE Corp.*, 457 U.S. 624, 642-43 (1982) (plurality opinion of White, J.);[23] *Allenberg Cotton Co. v. Pittman*, 419 U.S. 20 (1974).

In *Brown-Forman Distillers Corp.* this Court cited as authority *Shafer v. Farmers Grain Co.*, 268 U.S. 189 (1925). *Shafer* held that a pervasive state regulatory scheme governing the purchase of wheat for interstate shipment violated the Commerce Clause, since the "[b]uying for shipment" was "as much a part of [interstate

[21] *Brown-Forman Distillers Corp.*, identified three situations in which a regulatory statute will be held unconstitutional under the Commerce Clause without balancing national against local interests: (1) Direct regulation of interstate commerce; (2) Discrimination against interstate commerce; (3) When the "effect is to favor in-state economic interests over out-of-state interests." 476 U.S. at 579.

[22] There is apparent consensus about the proper approach to cases involving direct regulation of interstate commerce. For example, Justice Scalia apparently accepts the brightline rule that direct regulation of interstate commerce violates the Commerce Clause. *See CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 94 (1987) (Scalia, J., concurring in part and concurring in judgment) (joining Part III-B of the majority opinion).

[23] The analytical approach of the plurality opinion of Justice White was subsequently adopted by a majority of the Court. *See Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 578-79 (1986); *CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 88-89 (1987); *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 336-37 (1989).

commerce] as the shipping." 268 U.S. at 198. *Shafer*, indeed is but one of a long line of cases holding that states cannot directly regulate interstate commerce. *See, e.g., International Textbook Co. v. Pigg*, 217 U.S. 91 (1910) (State cannot require non-resident, non-localized foreign corporation transacting solely interstate business to register with the state). As this Court explained in *Shafer*, the right to conduct interstate commerce "is not a privilege derived from state laws and which they may fetter with conditions, but is a common right, the regulation of which is committed to Congress and denied to the States by the commerce clause of the Constitution." 268 U.S. at 198-99 (footnote omitted).

Shafer followed the line of reasoning in *Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 282 (1921). In *Dahnke-Walker* a Tennessee corporation contracted with a Kentucky farmer for the purchase of wheat through a locally resident agent. The wheat was to be used at the buyer's mill in Tennessee. Since the Tennessee corporation had made other purchases of wheat in Kentucky, the transaction was not a single isolated deal but part of a course of trade. This Court held that the transaction was in interstate commerce and that, therefore, Kentucky could not regulate it. The Tennessee corporation could not be required to register in Kentucky. *See also Lemke v. Farmers Grain Co.*, 258 U.S. 50 (1922).

The ongoing vitality of the *Shafer* and *Dahnke-Walker* line of cases was reaffirmed in *Allenberg Cotton Co. v. Pittman*, 419 U.S. 19 (1974). In *Allenberg*, a Memphis, Tennessee, cotton merchant negotiated a contract with a Mississippi farmer for the delivery of cotton to be resold on the interstate and international markets. This transaction was part of a common course of dealing and was not an isolated incident. This Court held that the transaction was in interstate commerce, and, therefore, Mississippi could not constitutionally require the Tennessee cotton merchant to register in Mississippi. A direct regu-

lation of an exclusively interstate transaction violated the Commerce Clause.

Shafer, *Dahnke-Walker*, and *Allenberg* continue to be good law and have been cited in very recent decisions of this Court. As previously noted, this Court cited *Shafer* for the proposition that a state statute that directly regulates interstate commerce violates the Commerce Clause without a balancing analysis. *See Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 579 (1986). And both *Dahnke-Walker* and *Allenberg* were reaffirmed and relied on by Justice Kennedy's majority opinion in *Bendix Autolite Corp. v. Midwesco Enters., Inc.*, 486 U.S. 888, 893 (1988).

B. North Dakota's Use-Tax Collection Requirement Has Regulatory Characteristics.

The challenged North Dakota statute is essentially regulatory in nature. States that impose a duty on retailers to collect use taxes are conscripting those sellers into service on behalf of the state. Quill does not challenge the authority of North Dakota to levy the use tax on its own citizens; it contests the burdensome character of the regulatory mechanism by which North Dakota seeks to enforce the tax.

Under North Dakota law, which is typical in this regard, "the consumer is ultimately responsible for the tax." *North Dakota v. Quill Corp.*, 470 N.W.2d at 205. The retailer must register with the state but is merely "required to collect the tax from the consumer and remit it to the State." *Id.* Under the typical scheme, if the retailer fails to collect the appropriate tax, it becomes liable for the deficiency to the state out of its own funds. *See National Geographic Soc'y v. California Bd. of Equalization*, 430 U.S. 551, 558 (1977). Thus, under a sales/use tax regime, the retailer serves as a state-conscripted conduit for the collection of state taxes from consumer-purchasers. The tax liability of the retailer is only contingent upon the retailer's failure properly to assess and collect the tax owing from the consumer. This liability in reality is in the nature of a fine or a penalty for the retailer's inability or refusal to assess or collect the tax from the consumer.

Operationally, the North Dakota sales/use tax collection framework requires retailers (including catalog sellers such as Quill) to register with the state. This is a regulatory mechanism that is akin to the requirement under traditional state corporate law that corporations doing business in the state must register ("qualify to do business") with the state. Appropriate and complete analysis of the impact of the North Dakota statute on the conduct of interstate business activity requires analysis of the *National Bellas Hess* doctrine in the context of controlling precedent imposing limitations on the power of states to require non-resident corporations to qualify to do business in a state when doing exclusively interstate business. *See Allenberg Cotton Co. v. Pittman*, 419 U.S. 20 (1974).

A major concern of the Court in *National Bellas Hess* was the need for national uniformity, the absence of which would impose "impediments upon the free conduct of . . . interstate business." 386 U.S. at 759. The Court in *National Bellas Hess* worried about the burdens on interstate commerce that would arise from "[t]he many variations in rates of tax, in allowable exemptions, and in administrative and record-keeping requirements." *Id.* These "could entangle . . . interstate business in a virtual welter of complicated obligations to local jurisdictions. . . ." Such a regime would be inconsistent with the "very purpose of the Commerce Clause," which was to "ensure a national economy free from such unjustifiable local entanglements." *Id.* at 759-60.

It is clear that in *National Bellas Hess* the Court was not so much focusing on the fairness of the taxation methodology as on the burdens on commerce stemming

from the regulatory character of the challenged statute. Burden-on-interstate-commerce concerns are incorporated in this Court's traditional Commerce Clause jurisprudence regarding state regulatory statutes. In the regulatory sphere, direct regulation of interstate commerce (as in the present case) is unconstitutional under the Commerce Clause.

Quill's grievance, as was the case in *National Bellas Hess*, is with the regulatory reach and character of the North Dakota use-tax-collection law. There is no challenge to the fairness of North Dakota's imposing a use tax on its own citizens. The challenge is to the burdensomeness of the state's use-tax-collection regulation on the system of interstate commerce. For example, in *National Bellas Hess*, the Court concluded that only Congress had the "power of regulation and control" over exclusively interstate commerce where there was no localization. 386 U.S. at 759-60. *National Bellas Hess* has not been undermined by *Complete Auto*; rather, *National Bellas Hess* remains fully vibrant, consistent not only with *Complete Auto* but also with *Allenberg* and similar cases holding that direct regulation of interstate commerce violates the Commerce Clause.

C. The Commerce Clause/Regulation Cases Reinforce the Nexus Analysis of *Complete Auto* and Require Reversal of the Decision of the North Dakota Supreme Court.

The Commerce Clause bars direct regulation of interstate commerce by states. This broad principle has been enforced in the *Allenberg* line of cases by a bright-line rule that state regulatory authority cannot be exercised over non-resident, non-localized firms doing exclusively interstate commerce. This principle is parallel to and reinforces the physical presence requirement set forth in *National Bellas Hess*.

In *Allenberg* it was argued that the Tennessee cotton merchant had been doing business in Mississippi and therefore had localized its operations sufficiently to allow Mississippi to enforce a registration requirement. This Court took that issue seriously, going to great lengths to distinguish *Eli Lilly & Co. v. Sav-On-Drugs, Inc.*, 366 U.S. 276 (1961), and *Union Brokerage Co. v. Jensen*, 322 U.S. 202 (1944). In *Allenberg* this Court found *Eli Lilly* "not in point" because "the foreign corporation had an office and salesmen [in-state] selling drugs intrastate. Since it was engaged in an intrastate business it could be required to obtain a license even though it also did an interstate business." 419 U.S. at 32. Similarly, *Union Brokerage* was not determinative because the custom house broker involved therein had localized its business and thus had a distinct presence within the state, even though it did an interstate trade. Thus, the broker could be required to register by the state in which it had a presence. *Id.* at 32-33.

In the *Allenberg* line of cases this Court has had to deal with the precise issue raised in this litigation, and this Court has consistently drawn the same line in those cases as it did in *National Bellas Hess*. The counterparts to *Eli Lilly* and *Union Brokerage* (distinguished in *Allenberg*) in the *National Bellas Hess* line of cases are such decisions as *Scripto, Inc. v. Carson*, 362 U.S. 207 (1960), and *National Geographic Soc'y v. California Bd. of Equalization*, 430 U.S. 551 (1977). In *Scripto*, Florida was allowed to impose a duty of collecting use tax on a Georgia seller because the seller had "10 wholesalers, jobbers, or 'salesmen' conducting continuous local solicitation in Florida and forwarding the resulting orders to Atlanta for shipment of the ordered goods." 362 U.S. at 211. This Court in *National Bellas Hess* explicitly distinguished *Scripto* on the ground of lack of localization, 386 U.S. at 757-58, the same ground the *Allenberg* Court relied on to distinguish *Eli Lilly*. Similarly, in *National Geographic*, this Court permitted California to require the seller to collect use tax because the seller had two ad-

vertising sales offices in California. The Court in *National Geographic* noted that *National Bellas Hess* drew a "sharp distinction . . . between mail order sellers with retail outlets, solicitors, or property within [the taxing] State, and those [like National Bellas Hess] who do no more than communicate with customers in the State by mail or common carrier as part of a general interstate business." 430 U.S. at 559, quoting *National Bellas Hess*, 386 U.S. at 758. The *National Bellas Hess* Court found the "sharp distinction" it drew to be generally recognized and valid and declined to "obliterate it." *Id.* The Court in *National Geographic* accepted the distinction and merely applied it to a different set of facts—a situation where localization had occurred. 430 U.S. at 559.

Under the *Allenberg* line of cases, no state can require registration when a non-resident, non-localized foreign corporation engages exclusively in interstate commerce. In *Allenberg* this Court painstakingly demonstrated the lack of localization of the Tennessee cotton merchant in Mississippi:

> Appellant . . . has no office in Mississippi, nor does it own or operate a warehouse there. It has no employees soliciting business in Mississippi or otherwise operating there on a regular basis; its contracts are arranged through an independent broker, who has no authority to enter into contracts on behalf of appellant. . . . . In short, appellant's contracts with Mississippi do not exhibit the sort of localization or intrastate character which we have required in situations where a State seeks to require a foreign corporation to qualify to do business.

419 U.S. at 33.[24]

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[24] The Court in *Allenberg* left open the question whether the cotton grown and stored in Mississippi, because of its physical presence in Mississippi, provided local tax incidents that could be reached. The validity of such a tax would be analyzed under the *Complete Auto* framework.

This analytical approach tracks very closely with the approach adopted in *National Bellas Hess* and subsequent cases. It is therefore quite clear that, under *Allenberg*, Quill could not be required by North Dakota to qualify to do business, just as, under *National Bellas Hess*, it cannot be required to register and collect North Dakota use taxes.

These parallel and reinforcing lines of cases demonstrate the compelling rationale for the ongoing vitality of *National Bellas Hess*. Under the current doctrinal regime, a seller is only required to register and undertake use-tax-collection obligations for a state when it would otherwise be required to register to do business in a state. When states cannot require non-resident, non-localized foreign corporations doing exclusively interstate business to register to do business, they cannot require those same companies to register as agents of the state for purposes of collecting the state's use tax. The nature of the state's regulatory burden on companies is similar in the two situations, and it makes good sense to retain the linkage that exists under current doctrine. If a company must qualify to do business within a state—a decision it can control—the company is on notice that it must also register to collect and remit use taxes for that state.

The bright-line rule that characterizes the *Allenberg* and the *National Bellas Hess* approaches is easily administrable, keeps the regulatory burden on doing business under control, and does not put the courts in the business of incessantly intervening in the process of fine-tuning the rules regarding the scope of state regulatory power.[25] The *Allenberg* and *National Bellas Hess* formulations have had the virtue of minimizing litigation and allowing participants in the marketplace to guide their business judgments by clearly defined and easily understood rules.

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[25] The merit of a bright-line rule "lies in the clarity of its command and the certainty of its application," even if there are some costs that may be associated with its use. *See Minnick v. Mississippi*, —— U.S. ——, 111 S. Ct. 486 (1990).

This is a virtue that will be lost by a shift to an amorphous, litigation-generating formulation as suggested by the North Dakota Supreme Court.

This Court's analysis in the very recent *Bendix Autolite Corp. v. Midwesco Enters., Inc.*, 486 U.S. 888 (1988), provides further support for the application of the *Allenberg* line of cases to reverse the decision of the North Dakota Supreme Court. In *Bendix Autolite*, an Illinois corporation sold and installed a boiler in Ohio. A dispute arose, and suit was brought against the Illinois corporation. Ohio's statute of limitations was tolled because the Illinois corporation was not present in Ohio and had not designated an agent for service of process. This Court held the Ohio tolling law violative of the Commerce Clause.

Ohio forced a company to choose between the burden of designating an agent for service of process (thereby subjecting it to general jurisdiction in Ohio) and forfeiture of a statute of limitations defense. This Court found that choice to be a significant Commerce Clause burden and held that Ohio could not withdraw the limitations defense "on conditions repugnant to the Commerce Clause." *Id.* at 893. Under *Allenberg* and *Dahnke-Walker*, the Illinois corporation could not be required to designate an agent for service of process; conditioning a limitations defense on the "waiver or relinquishment" of those rights violated the Commerce Clause.

Bendix Autolite has a direct bearing on the issues in this matter. Under *Allenberg* and *Dahnke-Walker*, North Dakota has no right to assert regulatory authority over a non-resident, non-localized company like Quill that engages exclusively in interstate commerce. Thus, North Dakota cannot require Quill to register in North Dakota. But Quill fails to register at its peril. Under North Dakota's typical use tax regime, Quill's failure to register makes it liable from its own funds for use taxes North Dakota says are owing from Quill's customers.

Thus, Quill faces a very costly choice, much like the choice deemed unconstitutional in *Bendix Autolite*. In *Bendix Autolite*, Ohio cut off a limitations defense so long as the Illinois corporation exercised its constitutional right not to register. Here, North Dakota imposes tax liability on Quill for exercising its *Allenberg* rights not to register. Surely, North Dakota cannot impose this barrier to access to its marketplace. *Allenberg* and numerous other Commerce Clause cases protect the right of non-resident, non-localized foreign corporations to transact interstate business. Yet, North Dakota conditions this access in an extremely onerous manner. If Quill is to sell in North Dakota, it must either relinquish its *Allenberg* rights not to register or subject itself to potential liability for uncollected use taxes.[26] This is precisely the type of burden on the national economic marketplace that *Bendix Autolite* held to violate the Commerce Clause.

A shortcoming, then, of the North Dakota Supreme Court's analysis of this matter is not only its failure to adhere to the still-valid nexus approach of *National Bellas Hess* and *Complete Auto*, but also its failure to examine the entire commercial context in which the issue arises. The North Dakota Supreme Court ignored the critical significance of the *Allenberg/Dahnke-Walker* line of Commerce Clause regulation cases despite the fundamental symmetry between the approaches in *Allenberg* and *National Bellas Hess*. There is no dispute about the constitutional ability of North Dakota to levy a tax on the use of goods bought by its residents from Quill. What is at issue is the regulatory technique of collection embraced by North Dakota to enforce its power of taxation.

[26] As in *Bendix Autolite*, Quill would likely be subject to personal jurisdiction in North Dakota and therefore subject to suit in North Dakota for collection of taxes. *See World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980). That the personal jurisdiction issue differs from the Commerce Clause issue is clear from the statement in *Allenberg* that "[w]hether the course of dealing would subject [Allenberg] to suits in Mississippi is . . . a different question on which we express no view." 419 U.S. at 34.

North Dakota is seeking directly to regulate exclusively interstate transactions and to thrust its regulatory power extraterritorially; this it cannot do under the Commerce Clause.

CONCLUSION

Amici curiae respectfully submit that this Court should reverse the North Dakota Supreme Court in *Quill* and reaffirm the principles set forth in *National Bellas Hess* and the other cases of like result.

Respectfully submitted,

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